

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1283

To be argued by
HOWARD W. GOLDSTEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1283

UNITED STATES OF AMERICA,

Appellee,

—v.—

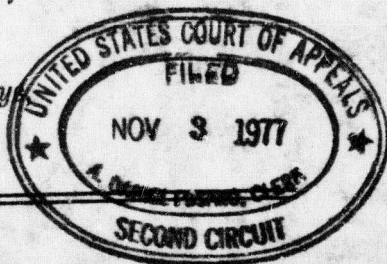
ALBERT DUKE, DONALD NIANG and ALBERT
WILLIAMS, a/k/a "SONNY," a/k/a "J.R.,"
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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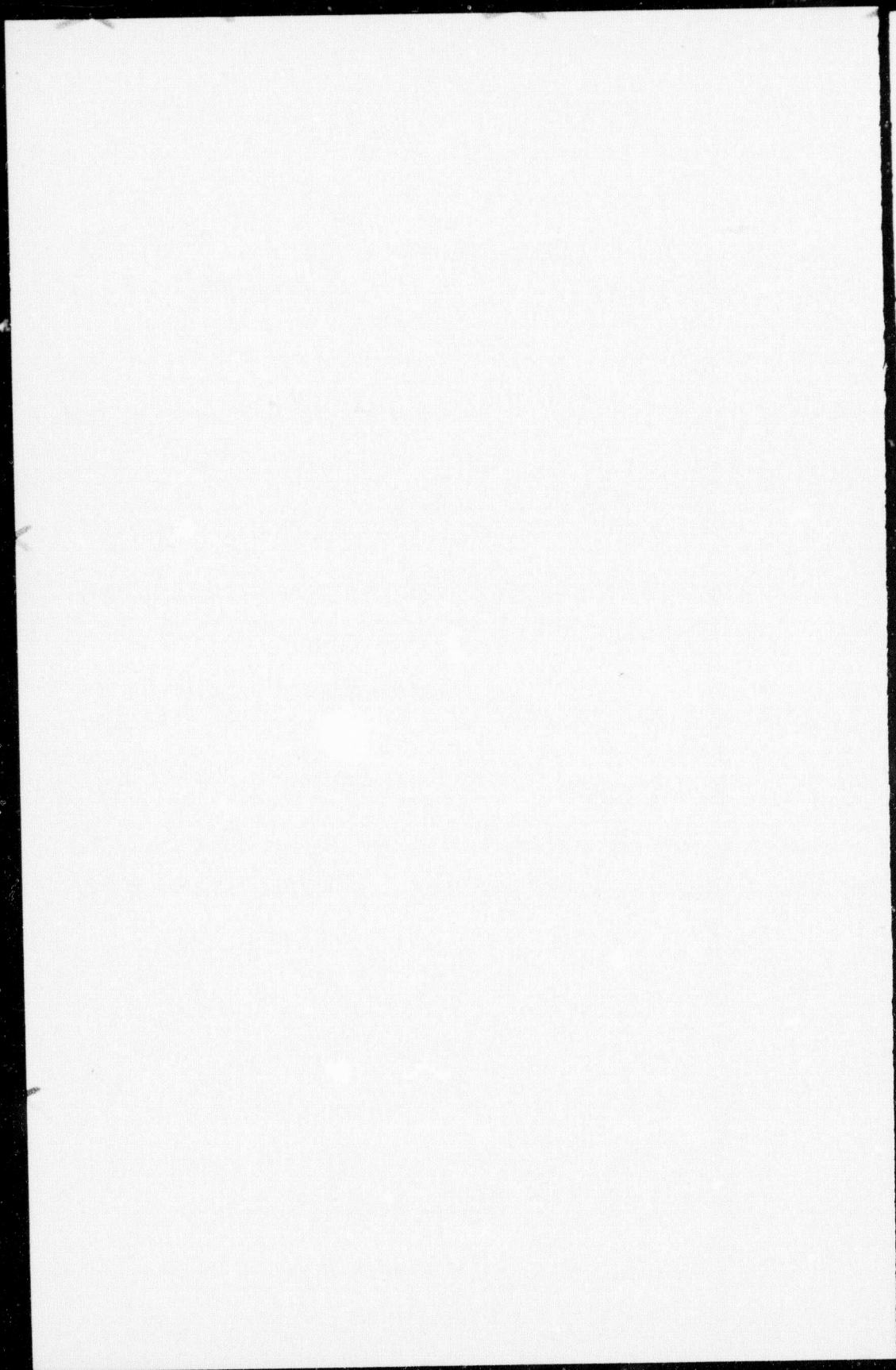


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ALBERT DUKE, DONALD NIANG and ALBERT
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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Albert Duke, Donald Niang and Albert Williams, a/k/a "Sonny," a/k/a "J.R.," appeal from judgments of conviction entered as to Duke on February 23, 1977, and as to Niang and Williams on June 2, 1977, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment S 76 Cr. 916, filed November 24, 1976, charged the defendants and six co-conspirators—Ted Adams, Pruitt Williams, Ermajean Adams, a/k/a "Teddy's Sister," Rodney Crosby, August Barbine, Jr., a/k/a "James Johns," a/k/a "Jimmy" and Freddie Pettaway—with violations of the National Stolen Property Act. Count One charged the defendants and co-conspirators with conspiring (1) to transport approximately

\$500,000 worth of stolen securities in interstate commerce and (2) to receive, conceal, store, barter, sell and dispose of the stolen securities. Count Two charged defendants Niang and Williams and co-conspirators Barbine, Ted Adams and Pettaway with transporting and causing the interstate transportation of approximately \$118,000 worth of stolen securities, in violation of Title 18, United States Code, Sections 2314, 3237 and 2. Count Three charged defendants Duke, Niang and Williams with the unlawful receipt and sale of the securities which were the subject of Count Two, in violation of Title 18, United States Code, Sections 2315 and 2. Count Four charged the defendants Duke, Niang and Williams and co-conspirators Pruitt Williams, Barbine, Ted Adams and Ermajean Adams with transporting and causing the interstate transportation of approximately \$315,000 worth of stolen securities, in violation of Title 18, United States Code, Sections 2314, 3237 and 2. Count Five charged the defendants Duke, Niang and Williams and co-conspirators Pruitt Williams, Barbine and Ted Adams with the unlawful receipt and sale of the securities which were the subject of Count Three, in violation of Title 18, United States Code, Sections 2315 and 2.*

* Indictment S 76 Cr. 916 superseded Indictment 76 Cr. 916, filed on September 24, 1976. In addition to Duke, Niang and Williams, the former indictment named the co-conspirators as defendants. On November 16, 1976, Crosby pleaded guilty to Count One, the only count with which he was charged. He was subsequently sentenced by Judge Gagliardi to sixty days imprisonment and two years probation under the Youth Corrections Act. Barbine, who pleaded guilty to Count Four on November 22, 1976, was sentenced by Judge Gagliardi on January 4, 1977, to a term of imprisonment of fifteen months. On November 24, 1976, Ted Adams, Pruitt Williams and Ermajean Adams pleaded guilty to Counts One and Two, One and Four, and One, respectively, in the Northern District of Ohio, pursuant to Rule 20, Fed. R. Crim. P. On January 7, 1977, Ted Adams was sentenced to concurrent terms of imprisonment of three years; Ermajean Adams was sentenced

[Footnote continued on following page]

Trial commenced against Albert Williams, Donald Niang and Albert Duke on December 2, 1976. On December 8, 1976, the jury returned verdicts of guilty on all five counts as to Niang and Williams and on Counts One and Three as to Duke. Duke was acquitted on Counts Four and Five.

On February 23, 1977, Judge Gagliardi sentenced Duke to a term of imprisonment of five years on Count One, of which three years were to run concurrent and two consecutive to a prior seven year sentence imposed on Duke on September 16, 1976, by the Honorable Edward Weinfeld, United States District Judge, for a similar offense. With respect to Count Three, Judge Gagliardi sentenced Duke to seven years' imprisonment, five years of which were to run concurrent to both the prior sentence imposed by Judge Weinfeld and the sentence on Count One.*

On June 2, 1977, Judge Gagliardi sentenced both Niang and Williams to concurrent terms of imprisonment of eighteen months on Counts One, Three, Four and Five, and six months on Count Two. Execution of the sentences on the latter count was suspended, and the

to three years' imprisonment, execution of sentence was suspended, and she was placed on probation for three years; Pruitt Williams was sentenced to concurrent terms of imprisonment of three years, with three months in confinement, execution of the balance suspended and three years' probation. An order *nolle prosequi* was entered on Indictment 76 Cr. 916 as to Freddie Pettaway on June 3, 1977.

* Indictment 76 Cr. 577, filed on June 21, 1976, charged Duke with conspiracy and with causing the interstate transportation of stolen securities, in violation of Title 18, United States Code, Sections 371, 2314 and 2. Duke was released on bail and was awaiting trial on those charges when, on June 16, 1976, he handed FBI undercover agent John Hauss, 9300 shares of stolen Potomac Electric Power Company stock in the instant case. See pp. 11-12 *infra*.

defendants were placed on probation for four year periods, to commence upon completion of their incarceration.

Niang and Williams are at liberty pending appeal. Duke is serving the sentence imposed upon him by Judge Weinfeld.

Statement of Facts

The Government's Case

A. Synopsis

The Government's proof established that Duke, Niang, Williams and the six co-conspirators combined to steal, to transport from Toledo, Ohio to New York, New York and to dispose of more than \$500,000 worth of securities. The evidence showed that Barbine, Crosby, Ted Adams,* Pruitt Williams and Ermajean Adams, all of whom lived in Toledo, Ohio, planned and executed three stock thefts from the Toledo Trust Company, a bank in Toledo, Ohio. Niang and Williams were the middlemen, responsible for arranging the transportation of the stock to New York and for passing the stock to Duke. Duke, in turn, was responsible for the stock's ultimate disposal.

The Government's case consisted of eleven witnesses including Crosby, Barbine, Adams and Pruitt Williams, and some thirty-two documentary exhibits.

B. The conspiracy is conceived

During the first week in April, 1976, Rodney Crosby, who was nineteen years old and employed as a mail clerk by the Toledo Trust Company, met his fiancée's brother,

* Hereinafter, "Adams" will refer to Ted Adams. Pruitt Williams will be referred to by his full name to distinguish him from the defendant Albert Williams.

August Barbine, Jr., in Atlanta (Tr. 46-48, 72).^{*} When Barbine learned that Crosby worked in a bank, he asked Crosby whether he had access to and could obtain stocks and bonds. After some initial hesitation, Crosby told Barbine he might be able to obtain as much as \$1,000,000 worth of securities and agreed to do so. (Tr. 48-52, 159).^{**} The two men agreed that when Crosby returned to Toledo, he would send Barbine, in Atlanta, a sample bond so that Barbine could make preliminary arrangements to dispose of the securities. (Tr. 52, 160). Barbine spoke to some people in Atlanta about disposing of stolen securities, but never received a sample from Crosby. Towards the end of April, Barbine returned to Toledo. (Tr. 160).

C. The first stock theft

In Toledo, Barbine was introduced by his life-long friend Pruitt Williams to Ted Adams. Sometime during the last week in April or first week in May 1976, Barbine told Adams and Pruitt Williams that he could get a package of bonds worth approximately \$1,000,000 from his "brother-in-law," Rodney Crosby, who worked in a bank. Adams and Pruitt Williams agreed to take part in the scheme and that night, the three men discussed the best means of disposing of the stock. While several cities outside Ohio were discussed, the trio decided to bring the stock to New York, where Ted Adams' old friend,

^{*} "Tr." refers to the trial transcript; "GX" refers to Government's exhibits; "DX" refers to defendant Williams' exhibits; "Br." refers to the brief of the specified appellant.

^{**} Crosby, who was earning approximately \$476 per month (Tr. 46-47), initially suggested the \$1,000,000 figure as a joke. (Tr. 70-71). He was, however, completely serious about stealing the stock. (Tr. 78).

Fred Pettaway, could put them in touch with people who could dispose of the stock. (Tr. 87-89, 136-38, 161-62).*

Barbine then contacted Crosby, who reconfirmed his willingness to steal securities from the Toledo Trust Company. Arrangements were made for Adams to pick up the securities from Crosby. (Tr. 90-91, 162).**

On May 4 or 5, 1976, Crosby took an envelope from the mail room of the Toledo Trust Company and delivered it to Ted Adams. (Tr. 55-58, 91-93).*** The envelope contained bond coupons payable to the Monroe County Michigan Pollution Control Board worth approximately

* Barbine testified that Ermajeau Adams was present during this planning session. (Tr. 161).

** Crosby's recollection of how the arrangements were made differed from that of Adams and Barbine. Thus, Crosby recalled meeting Adams and Barbine at Adams' home prior to the first theft. He testified that the three of them drove to the home of Crosby's cousin, who Crosby had said would be his source. Crosby testified that while parked outside his cousin's home, Adams told him that Adams' "people" did not deal in "small" amounts. (Tr. 53-54). Adams and Barbine, on the other hand, testified that the arrangements for the first theft were made over the telephone and that Adams was described to Crosby by Barbine. (Tr. 91, 162). While Barbine recalled the meeting in the car, he testified it took place in between the first and second thefts. (Tr. 164).

*** As with the meeting between Crosby, Adams and Barbine, *supra*, there were discrepancies among the accomplices with respect to the circumstances of the stock delivery. Thus, Crosby testified that he gave the securities to Adams in an elevator in the bank's basement. (Tr. 56-57). Adams testified that while the plan initially called for the delivery to occur in the bank's basement, Crosby delivered the stock to him at a bus stop by the side entrance of the bank where he was waiting with Pruitt Williams. (Tr. 92-93). Pruitt Williams recalled going to the bank with Ted Adams to pick up some stock, but testified that he accompanied Adams on the second stock pick-up. (Tr. 138-39). Of course, these discrepancies were matters for the jury to resolve.

\$2300 and 200 shares of stock of the Houston Natural Gas Corporation worth approximately \$6000.*

When Adams returned home, he, Barbin, and Pruitt Williams examined the securities Adams had obtained. Later that evening or the next day, Adams spoke to Pettaway and told him he had some valuable merchandise that he and a friend wanted to bring to New York. Pettaway agreed to help. (Tr. 94-97, 139, 163).

D. The second theft

On Sunday, May 9, 1976, Barbine made arrangements for Crosby to deliver more stock to Adams the following day. (Tr. 58-59, 97, 164). On Monday, May 10, 1976, Crosby took an envelope containing stock from the Toledo Trust Company mail room and gave it to Adams, who was waiting at the bus stop outside the bank. (Tr. 60-61, 97-98, 139). The envelope contained 9300 shares of

* Adams, Pruitt Williams and Barbine each testified that the first set of securities picked up by Adams contained a set of bond coupons, although they could not recall the name on the bonds. (Tr. 93-94, 138-39, 163, 305). The registered mail list of the Toledo Trust Company for May 4, 1976, indicated that a mailing of \$2,287.44 worth of bond coupons of the Monroe County Michigan Pollution Control Board had been prepared on that day and subsequently marked void. (Tr. 322-26; GX 1, 2).

Neither Adams nor Pruitt Williams was able to recall the name of the stock obtained in the first theft. Barbine testified the stock was of the Houston Natural Gas Corporation (Tr. 162-63, 305). Allan Harris, assistant supervisor of securities administration for the Toledo Trust Company testified that on May 4, 1976, 200 shares of stock of the Houston Natural Gas Corporation were prepared for mailing to Pershing & Company, a New York brokerage house. (Tr. 350-54, 336-37, GX 10, 11, 12). The stock was never received by Pershing. (GX 13).

stock of the Potomac Electric Power Company, worth approximately \$120,000.*

That evening, Freddie Pettaway called Ted Adams from defendant Albert Williams' phone in New York and told him there would be two tickets to New York waiting for Adams at the airline terminal in Toledo. (Tr. 99, 179-80, 358, 363; GX 27A, 27B). Pettaway also put a man named "Donald" on the phone, who told Adams he would help him get to New York. (Tr. 100-01; GX 27A, 27B).

E. The stock is brought to New York

On May 11, 1976, Barbine and Adams went to the airport in Toledo but missed their flight to Newark.** (Tr. 103). On May 12, 1976, they flew to Newark airport, using tickets purchased for them by defendants

* Neither Adams nor Pruitt Williams could recall the name of the stock obtained in the second theft, although both testified it was worth over \$100,000. (Tr. 98, 140). Barbine testified the stock obtained in the second theft was more than \$100,000 worth of stock of the Potomac Electric Power Company. (Tr. 165). Robert Black, assistant treasurer and supervisor of the securities operations department of the Toledo Trust Company, testified that on Friday, May 7, 1976, 9300 shares of Potomac Electric Power Company stock were prepared for transmittal to the Toledo Trust Company's transfer agent in Washington, D.C. so the stock could be put in the name of the Toledo Trust Company's nominee. The transfer agent never received the stock. (Tr. 326-31, GX 3, 4, 6).

Crosby testified that mail did not always go out on the day it was prepared. (Tr. 64). As such, the jury could infer that Barbine's recollection was correct and that the Potomac stock, prepared for transmittal on Friday, May 7, 1976, was in the bank on Monday, May 10, 1976, for Crosby to steal.

** A collect telephone call was made from Newark, New Jersey to Albert Williams' home on the night of the missed flight. (Tr. 363; GX 27A, 27B).

Albert Williams and Donald Niang. (Tr. 104, 165-66, 502; GX 22, 23, 24A, 24B, 25A, 25B).*

At Newark airport, Barbine and Adams were met by Freddie Pettaway, Albert Williams, who was introduced to them by Pettaway as "Sonny," and an unidentified woman. After dropping Pettaway and the woman off at Pettaway's gymnasium in the Bronx, Williams took Barbine and Adams to Donald Niang's apartment at 480 St. Nicholas Avenue in Manhattan. (Tr. 104-06, 167).

In Niang's apartment, Williams asked Barbine if he could see the securities. Barbine took him into the bedroom and showed him the stock. Williams stated he had been expecting bonds, but thought he would still be able to dispose of the stock certificates. (Tr. 107-08, 168).

Later that afternoon, Adams, Barbine, Williams and Niang went to Lenox Avenue where Williams and Niang took a sample of the stock into a store. An hour later, they returned to the car with the samples and told Adams and Barbine that the man who handled the stock was out of town. (Tr. 109, 168-69). The four men proceeded to Pettaway's gym where they discussed how any proceeds would be divided.** Niang told Barbine and Adams that it would have been easier to dispose of bearer security notes. (Tr. 169-70).

About one week after his arrival, Adams returned to Toledo, using the first half of a New York-Toledo-New York round trip airline ticket purchased by Niang. (Tr. 109-10, 170-71, 515-16).

* Barbine travelled under the name James Johns. (Tr. 166).

** Pettaway was not present during this conversation. (Tr. 170).

F. The third theft

Before Adams left New York, Barbine, who had been told by Williams that more stock could be sold, called both Pruitt Williams and Crosby in Toledo from Niang's phone and arranged for a third stock theft. (Tr. 64, 143, 171-72, 264, 364; GX 28A, 28C). On or about May 19, 1976, Crosby took a manila envelope out of a filing cabinet drawer in the Toledo Trust Company mail-room and gave it to Ermajean Adams, who was waiting outside the bank. (Tr. 61-63, 111, 144). The envelope contained 10,963 shares of preferred stock of the Reliance Electric Engineering Company, worth approximately \$560,000.*

G. The second trip to New York

On or about May 19, 1976, using the second half of the round trip ticket purchased by Niang, see p. 9, *supra*, Pruitt Williams brought the Reliance Electric Engineering Company stock to New York and gave it to Barbine. The following day, Barbine and Pruitt Williams went to Niang's apartment, where Barbine gave the stock to Niang. Williams, who was at the apartment, examined the stock and stated he would try to dispose of it. (Tr. 112-14, 145-48, 173-75).

Shortly thereafter, Niang and Barbine zeroxed the stock at Williams' request. Niang told Barbine he was

* Barbine identified the stock obtained in the third theft as Reliance Electric Company stock. (Tr. 175). Robert Black testified that on May 18, 1976, 10,963 shares of Reliance Electric Engineering Company preferred stock were prepared for transmittal to the Cleveland Trust Company for conversion into common stock. The Cleveland Trust Company never received the Reliance preferred shares. (Tr. 331-34; GX 7, 9A, 9B, 9C, 9D).

going to give the stock to Williams. Barbine never saw the stock again. (Tr. 175-76).

H. Duke disposes of the stock

After the stock was zeroxed, Williams confirmed that he had the stock and told Barbine he was going to give the stock to a man named Duke, who would have the names changed on the stock certificates and sell them. (Tr. 176-77). On five or six occasions during the next three to four weeks, Williams and Niang met with the defendant Albert Duke in Barbine's presence.* Prior to these meetings, Williams and Niang would tell Barbine that they were going to meet with Duke to find out what was happening with the stock, which was still for sale. After their meetings with Duke, Niang and Williams would report to Barbine, telling him that Duke was having the names on the certificates changed, that Duke was having the certificates switched and that Duke was being slow. (Tr. 176-78, 184, 306-07).

On June 3, 1976, John Hauss, an undercover agent of the Federal Bureau of Investigation ("FBI") posing as a corrupt banker named John Knapp, met Duke at McGraw's Restaurant and Bar in midtown Manhattan to discuss a fraudulent transfer of funds by wire. (Tr. 392-93, 416). During the conversation, Duke told agent Hauss that he could obtain some "freshly taken" common stock. Hauss told Duke he was interested in the stock. (Tr. 393).

On June 15, 1976, Agent Hauss and Duke met again to discuss the wire transfer. Once again, Duke brought up the stolen stock, telling Hauss he had people flying in from out of town delivering securities. (Tr. 394).

* Barbine testified he did not personally speak to Duke. Nor did he hear the conversations between Duke and Williams. (Tr. 178, 201).

Hauss and Duke met at McGraw's Restaurant and Bar between 1:30 and 2:00 p.m. on June 16, 1976. In the course of a conversation about the wire transfer (Tr. 416), Duke once again told Hauss he could provide him with "freshly taken" stock. He told Hauss the stock was worth more than \$100,000 and would "remain cold" for approximately two weeks. Hauss agreed to take the stock and Duke left McGraw's. (Tr. 395).

Within an hour, Duke returned to McGraw's. He handed Hauss a paper bag wrapped in a newspaper. Inside the paper bag was a manila folder containing the 9300 shares of Potomac Electric Power Company stock which had been stolen from the Toledo Trust Company by Crosby. (Tr. 330-31, 395-97; GX 6, 6A).*

The Defense Cases

A. Albert Williams

The theory of Williams' defense was that all of his contacts with Barbine and Adams related to the planning of an amateur boxing tournament. No direct evidence to that effect was presented by Williams.

Samuel Price, executive director of Haryou Act Neighborhood Board Number 2, testified that Williams had been employed by the neighborhood board since spring,

* While waiting for the stock sale to be consummated, and in an effort to accelerate the pace at which the transaction was moving, Barbine had told Niang and Williams that once he received the proceeds of the stock sale, he could provide them with ten million dollars worth of municipal bonds and United States Treasury notes. (Tr. 210). A few days after June 16, 1976, Duke and Hauss met again. Duke asked Hauss how the stock transaction was progressing and told him he had a person who could provide him w Treasury bonds. (Tr. 397-98).

1974, at a salary of approximately \$5,618 per year. (Tr. 486-89; DX D). He testified that Williams, an amateur boxer,* had worked for the neighborhood board on projects relating to sports programs, including boxing, for the youth in Central Harlem.

On cross-examination, Mr. Price conceded that in May and June 1976, the neighborhood board did not have the equipment for a boxing tournament and that he did not know what Williams did when he was not at work. (Tr. 492-94).

Louis Miller, whose employment was not identified, testified that he could not identify in court the person to whom he had "sold a ticket to be used from Toledo, Ohio, to New York." The type of ticket was not identified. Nor were the airline tickets used by Barbine and Adams shown to him. (Tr. 495; GX 22, 23, 24A, 24B, 25A, 25B).

B. Donald Niang

Niang testified in his own behalf. He testified that in the spring of 1976, Freddie Pettaway told him and his brother, defendant Albert Williams, that he knew some people in Toledo, Ohio who wanted to arrange an inter-city boxing tournament between Toledo, Cleveland and Philadelphia.** The three men shared the cost of airline tickets to have Barbine, whom he knew as James Johns, and Adams come to New York. Niang agreed to lodge Barbine and Adams at his house, with Pettaway paying \$50 per week to cover their expenses. Niang stated Barbine and Adams gave him the impression they were interested in promoting the boxing tournament and that

* Price had never seen Williams fight. (Tr. 488).

** According to Niang, who stated he was an amateur boxer, he and his brother had previously donated a boxing ring to Pettaway's gym. (Tr. 501).

it would be funded by Pepsi-Cola, Coca-Cola and other organizations.* After a while, nothing happened with respect to the boxing tournament and Niang grew suspicious when Barbine came into the apartment at night "like he was high." When his wife's ring disappeared and his wife told Barbine she was going "to the police or to the pawnshop," Barbine left the apartment. Niang denied having anything to do with the stolen securities, admitted knowing Duke, and stated he and his brother never met Duke with Barbine present. (Tr. 500-06, 519-20).

On cross-examination, Niang conceded that during the time Barbine and Adams were staying at his house, eating his food, using his phone, and running up expenses, no boxing tournament materialized. He explained that he allowed Barbine to stay in his home for six or eight weeks because Pettaway was paying \$50 per week for Barbine's expenses and the money was "a big help." He conceded, however, that the \$50 per week did not cover Barbine's expenses. Niang admitted buying the round trip airline ticket used by Adams and Pruitt Williams. When questioned about a prior statement to the FBI in which he had admitted knowing that Duke dealt in stolen securities, Niang denied having made the statement. (Tr. 506-19).

C. Albert Duke

Duke presented an alibi defense through four witnesses.

John Lewis testified that he had been employed at the Metropolitan Hospital for thirty-one years. He stated that on June 16, 1976, at approximately 2:15 or 2:25 p.m., he saw Duke in the basement of the hospital where

* Adams testified that he never discussed a boxing tournament with either Niang or Williams. (Tr. 130-31).

he and Duke briefly discussed the previous night's Foreman-Frazier heavyweight championship fight. When Lewis left work at 3:15 p.m., he saw Duke in the hospital lobby, where they shook hands and said good-bye. Lewis stated he saw his son, John Lewis, Jr. with Duke that day. He testified he was not related to Duke in any way. (Tr. 444-48).

On cross-examination, Mr. Lewis conceded that he and Duke were friends and that his son, John Lewis, Jr., and Duke were brothers. (Tr. 448-52).

John Lewis, Jr., testified that he and Albert Duke had the same mother and grew up in the same house. He stated that on June 16, 1976, Duke visited him at approximately 2:00 p.m. at Metropolitan Hospital where he was an elevator operator. On that day, he and Duke discussed the Foreman-Frazier fight which had taken place the night before. They were together until 3:00 p.m. when Mr. Lewis went back to work after his break. Lewis saw Duke again at 3:30 when he finished work, and at 4:00 p.m. Lewis took Duke to the mosque temple on 116th Street and Lenox Avenue. (Tr. 453-58).

On cross-examination, John Lewis, Jr. admitted that he cared about his brother and saw him often. Nevertheless, he referred to his brother as "Mr. Duke" and never called him Albert. He denied being a Muslim, but explained his uncertainty about the full name of a Muslim he had seen at the hospital with Duke by stating "we go on a first-name basis, the Muslims." (Tr. 458-60).

Abdul Haqq Taha testified that he and Duke were brothers in the Nation of Islam, and that he had known Albert Duke for several years. He stated that on June 16, 1976, he received a message that one of the Muslim brothers had been hurt and was in the hospital. At approximately noon, he picked up Albert Duke and they

went to the mosque on 116th Street and Lenox Avenue. From there, they went to several hospitals looking for their hurt "brother". They arrived at Metropolitan Hospital at 2:00 or 2:15 p.m. and looked in the emergency ward for their hurt "brother". At Metropolitan Hospital, they saw Duke's blood brother John Lewis, Jr., who Taha knew as "Rahim". They stayed at the hospital for approximately forty-five minutes and left at approximately 3:30 or 4:00 p.m. (Tr. 462-70).

On cross-examination, Taha testified that John Lewis, Jr., who had denied being a Muslim on his own cross-examination, was, in fact, a member of the Nation of Islam. (Tr. 472). Taha stated that he himself was a religious man, that his religious brothers were important to him, that Duke was a brother and more than a friend, and that he and his religious brothers gathered together when one of them was in trouble. At first, he admitted that he had heard about the trial testimony from Duke. He then denied having discussed the trial with him. (Tr. 472-76).

Shamsiddin Riza testified that Duke was one of his Muslim brothers, and that he had known Duke for about two years. He stated that he saw Duke at the mosque at about 1:00 p.m. on June 16, 1976, and that at about 1:30 p.m. Duke entered a car with "brother Abdul." He next saw Duke at about 6:00 p.m. that evening. (Tr. 541-44).

On cross-examination, Riza admitted that he had been shown some papers by Duke prior to testifying, and that he had not seen Duke between 1:30 p.m. and 6:00 p.m. on June 16, 1976. (544-45).

ARGUMENT

POINT I

Niang's Motion for a Mistrial was Properly Denied.

Niang contends that the District Court erred in denying his motion for a mistrial, made when August Barbine, Jr., the Government's primary witness, stated during cross-examination that Niang had supplied him with narcotics during his stay in New York. That claim almost completely ignores the circumstances in which Barbine's answer was given and minimizes the swift corrective action taken by the court.

During his direct examination, Barbine testified that he was a former heroin user and had last used drugs in June, 1976. (Tr. 158). On cross-examination, one of the first subject areas probed by Niang's counsel was the extent of Barbine's narcotics usage. Counsel thoroughly explored the cost of Barbine's heroin habit and both the legal and illegal methods by which Barbine obtained the money he needed to pay for drugs. (Tr. 284-85).^{*} On cross-examination, Barbine testified that he used drugs "off and on" until the time of his arrest by local authorities in July, 1976. (Tr. 287).^{**}

After probing the extent of Barbine's habit, counsel asked Barbine how much he was spending on drugs just

^{*} Counsel was permitted to establish that in order to raise sufficient funds for his drug habit, Barbine supplemented his income as a truck driver by selling marijuana and committing "aggravated robberies and burglaries." (Tr. 285).

^{**} Contrary to the assertion made by Williams' counsel that Barbine was a heroin addict throughout the events in this case (Br. 6), Barbine testified that he ceased using heroin prior to this case and had only resumed its use on his arrival in New York in May and June, 1976. (Tr. 295).

prior to the time of his arrest in July, 1976. Barbine responded that Niang, with whom he was staying during that time,* and Williams were giving him drugs. Despite this response, counsel pressed on, asking, "Please tell me how much you were spending." Barbine responded, "I wasn't spending anything. They was giving them to me." (Tr. 287). Counsel for Niang then moved for a mistrial on the ground that Barbine's answer was not responsive. The court denied the motion, but *sua sponte* offered to strike the answer. Counsel accepted the court's offer and the answer was stricken. (Tr. 288).

Shortly thereafter, Niang's counsel asked Barbine if he wanted the jury to believe he had given securities to Niang without getting "anything in advance." (Tr. 295). Barbine responded that Niang "was supposed to advance me some drugs on it." (Tr. 296). Counsel did not object, move for a mistrial, or ask to have that answer stricken. Instead, he used the answer as the basis for a series of argumentative questions designed to suggest that Barbine was trying to blacken Niang by linking him to drugs. (Tr. 296). Then, in summation, despite the fact that the Government had not even mentioned the drug issue (Tr. 546-79), Niang's counsel raised its spectre, arguing to the jury that Barbine had mentioned Niang's drug involvement to "get the jury so mad at Niang it would convict him." (Tr. 577-88).**

* Barbine had previously testified that he stayed in New York with Niang until July 4, 1976, and had been arrested in Toledo on July 17 or 18, 1976. (Tr. 214, 220).

** Counsel's appellate claim of prejudice from Barbine's answers rings hollow in view of the advantage he sought from those very answers.

In the circumstances of this case, Judge Gagliardi clearly did not err in denying Niang's motion for a mistrial. Barbine's complained of answers were directly responsive to the questions of defense counsel, who chose to press Barbine on the cost of his drugs even though Barbine previously indicated that he was receiving the drugs from Niang and Williams.* Defense counsel was in a position to anticipate Barbine's response not only from the earlier answer, but by virtue of Barbine's written statements, furnished to counsel pursuant to the Jencks Act, which revealed that Barbine had linked both Niang and Williams to narcotics traffic in New York.**

The impression that defense counsel willingly walked into this subject matter is confirmed by his decision to go into this area after the denial of his motion for a mistrial and his use of the testimony in summation as evidence that Barbine was out to get Niang. Having made a tactical decision, the defendant cannot now complain that it caused him error. *Cf. United States v. Armedo-Sarmiento*, 545 F.2d 785, 795 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).

Even assuming that the defendant did not want to elicit this evidence, he was not prejudiced by it. Judge Gagliardi *sua sponte* struck the testimony, an action which is presumed to cure any prejudice and which overcomes any claim of reversible error here. *See, e.g., United States v. Apuzzo*, 555 F.2d 306 (2d Cir. 1977); *United States v.*

* Of course, it is apparent that the Government was not responsible for eliciting this testimony. Indeed, counsel for Niang stated in summation, "The government didn't ask it. The government played fair." (Tr. 587-88).

** Indeed, Judge Gagliardi, who had read Barbine's Jencks Act material in ruling on an issue raised by Duke's counsel, alerted all counsel to the fact that probing too deeply in some areas would run the risk of bringing out "an awful lot of damaging material." (Tr. 234).

Splain, 545 F.2d 1131 (8th Cir. 1976); *Atkinson v. United States*, 344 F.2d 97 (8th Cir.), *cert. denied*, 382 U.S. 867 (1965); *Ashton v. United States*, 324 F.2d 399 (D.C. Cir. 1963); *Shelton v. United States*, 169 F.2d 665 (D.C. Cir.), *cert. denied*, 335 U.S. 834 (1948).

POINT II

The District Court Did Not Abuse Its Discretion in Ruling that Niang Could Be Cross-Examined about His 1974 Narcotics Conviction.

Niang also contends that the District Court abused its discretion in permitting the Government to use Niang's 1974 narcotics conviction for impeachment purposes.* In the circumstances of this case, Judge Gagliardi's ruling was proper. On November 29, 1976, four days prior to the commencement of the trial, Niang's counsel asked the court to preclude the Government from cross-examining Niang about his 1972 forged security and 1974 narcotics convictions. The court ruled that the Government could cross-examine Niang about the former but reserved decision with respect to the latter. (Transcript of pre-trial conference, November 29, 1976, pp. 6-8).

The issue of Niang's narcotics conviction was next addressed on December 6, 1976, during the trial. At that time, Judge Gagliardi stated he would not rule on the propriety of using the conviction for impeachment pur-

* Niang does not claim any error in the court's ruling permitting the Government to cross-examine Niang about his 1972 forged security conviction.

poses until after he heard Niang's testimony. He told Niang's counsel the ruling would be made prior to the conclusion of Niang's direct examination, to enable counsel to question Niang about the conviction on direct examination in the event the court ruled it permissible cross-examination. (Tr. 436-37).

On December 7, 1976, prior to Niang's direct examination, Judge Gagliardi ruled that in view of Barbine's testimony, see pp. 17-18, *supra*, he would allow cross-examination about Niang's narcotics conviction. (Tr. 483-84). Niang testified in his own behalf.

Rule 609(a) of the Federal Rules of Evidence provides in pertinent part:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . ."

As this Court recently acknowledged in circumstances which in many ways are similar to those involved in this case, the rule gives a "broad discretion" to the trial judge which will not be disturbed "absent a clear showing of abuse." *United States v. Ortiz*, 533 F.2d 782, 784 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3239 (Oct. 11, 1977) (no abuse of discretion in allowing cross-examination of defendant about prior narcotics conviction). No such showing has been made here.

In considering the probative value of Niang's narcotics conviction, Judge Gagliardi was entitled to consider several

factors. First, as this Court noted in *United States v. Ortiz, supra*, 553 F.2d at 784, he was "entitled to recognize that a narcotics trafficker lives a life of secrecy and dissembling" and that "such activity in a witness' past is probative on the issue of credibility."

Second, as in *Ortiz, supra*, the conviction in this case was a recent one and, as such, had increased probative value. Indeed, Niang's narcotics conviction was even more recent than that of the defendant in *Ortiz*. See also, *United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977).

A third proper fact for the court to consider was that the Government's case against Niang depended heavily, if not exclusively, on the testimony of Barbine. Counsel for Niang, as well as counsel for Williams, had cross-examined Barbine vigorously, exploring not only his prior narcotics habit and arson conviction, but crimes and acts which had not yet resulted in convictions. (Tr. 280, 283-84, 295, 299, 300). In those circumstances, as Judge Gagliardi recognized (Tr. 482-84), the probative value of Niang's narcotics conviction was enhanced. It was important that the jury, which would have to weigh Barbine's credibility against Niang's, receive as complete a portrait of Niang as they possibly could. See e.g. *United States v. Ortiz, supra*, 533 F.2d at 785; *Gordon v. United States*, 383 F.2d 936, 941 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

In this regard, it is important to note that it seemed apparent that Niang intended to testify regardless of Judge Gagliardi's ruling. Thus, immediately prior to the court's ruling, counsel for Niang informed the court that he was prepared to present his case. As such, Judge Gagliardi was entitled to consider that this was not a case

in which a ruling adverse to Niang would prevent the jury from hearing an important version of the events.*

That Judge Gagliardi carefully weighed the probative value and prejudicial impact of the evidence of Niang's narcotics conviction is apparent from the record. He waited until immediately prior to Niang's testimony before ruling, thus insuring "opportunity for full consideration of all the factors before exercising his discretion." *United States v. Ortiz, supra*, 553 F.2d at 784. That discretion was not abused. See, *United States v. Apuzzo, supra*; *United States v. Hawley*, 554 F.2d 50 (2d Cir. 1977); *United States v. Hayes, supra*.

POINT III

The District Court Did Not Preclude Defendants from Establishing that Co-conspirator Freddie Pettaway had Fled and Was Unavailable to Them as a Witness.

Niang and Williams claim that the District Court erred in failing to allow Duke's counsel to cross-examine Special Agent Damon Taylor of the FBI about his knowledge of co-conspirator Freddie Pettaway's whereabouts. They assert that the court's ruling precluded them from establishing both that Pettaway was unavailable to them as a witness and that he had fled. That contention, based as it is on erroneous factual conclusions and a misapplication of law, must necessarily fail.

* In *United States v. Ortiz, supra*, the defendant did not testify and claimed that in weighing the prejudicial effect of cross-examination about a prior narcotics conviction, the Court of Appeals had to consider that allowing the cross-examination would keep the defendant from testifying. Nevertheless, this Court held the District Court had not abused its discretion.

Special Agent Damon Taylor of the FBI testified on direct examination that on June 16, 1976, Agent John Hauss gave him the 9300 shares of Potomac Electric Power Company stock that had been obtained from Duke. Upon receipt of the stock, Taylor attempted to ascertain the stock's lawful owner. It was not until late July, 1976, that he traced the stock to Ohio, contacted FBI agents in Toledo, Ohio and informed them that the New York FBI office had recovered the Potomac stock. (Tr. 417-18).

Taylor's cross-examination was conducted exclusively by counsel for Duke. (Tr. 429). In addition to inquiring about Taylor's efforts to learn the true owner of the Potomac Electric Power Company stock, the sole subject matter of Taylor's direct testimony, Duke's counsel questioned Taylor about the witnesses in Duke's prior case, the negotiability of stock certificates registered in a nominee name and the operation of insurance policies banks frequently maintain to insure stocks they own. Counsel then shifted the focus of his questions to Freddie Pettaway. The court sustained the Government's objections to the following questions: (1) "He is not, at this moment, to your knowledge, he is not at this moment available to the . . ."; (2) "Do you know where he is, Mr. Taylor?"; and (3) "You are aware that Fred Pettaway is presently at large, are you not?" (Tr. 426-27). In sustaining the Government's objections, the court noted:

"This witness' direct testimony covers solely the stock that was Exhibit 6, which he first saw on June 16, and the fact that the Houston and Reliance stock have not been recovered. That was the subject of this witness' direct testimony. I have given you a great deal of latitude to go into other areas. I think you have exceeded the area." (Tr. 426).

That ruling clearly was not an abuse of discretion. Nor did it have the effect now complained of by Niang and Williams.*

It is well established that "a trial judge has extensive discretion in controlling the scope and length of cross-examination." *United States v. Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). See e.g., *United States v. Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Mahler*, 363 F.2d 673, 676-78 (2d Cir. 1966). In the instant case, defense counsel had understandably seized upon the Government's decision to sever Freddie Pettaway as an opportunity to portray Pettaway as the moving force behind this conspiracy.** Thus, from the opening statements to the conclusion of the trial, defense counsel injected Pettaway's name into the proceedings at every possible moment. Given the fact that all counsel had conducted this defense by innuendo and the limited scope of agent Taylor's direct testimony, it was entirely appropriate for Judge Gagliardi to limit Taylor's cross-examination to the subject matter of his direct testimony. That decision was not an abuse of the broad discretion afforded him.

Moreover, counsel's failure to inform the court at the time of its ruling of the relevancy of the questions, which on their face appeared to be another detour from the facts and an invitation to speculation, precludes Niang and Williams from now asserting error. Rule 103(a)(2) of the Federal Rules of Evidence explicitly provides:

* As noted above, neither counsel for Niang nor counsel for Williams cross-examined Taylor. Duke, whose trial counsel conducted Taylor's cross-examination, does not raise this issue on appeal.

** Since Freddie Pettaway was still an indicted defendant at the time of the trial, see n. pp. 23, *supra*, the defendants could afford to create this defense without fear that the Government would call Pettaway to destroy it.

"(A) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

* * * * *

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Williams attempts to excuse his failure to make a proper offer of proof by stating that Judge Gagliardi did not allow side-bars during the examination of witnesses and it is "simply unreasonable to expect counsel, in the heat of cross-examination, to note every question or line of questioning sustained by the court in order that, hours later, he may bring them to the court's attention" (Williams Br. 17).^{*} The assertion that counsel could simply forget the court's preclusion of certain evidence, however, in addition to being totally inconsistent with the importance now being placed on that evidence, completely overlooks the fact that counsel for Williams was not conducting Taylor's cross-examination and could make careful note of each objection sustained by the court.

Prior to charging the jury, Judge Gagliardi emphasized to counsel that there was no evidence in the record with respect to Pettaway's availability. It was then for the first time that Niang and Williams explained the asserted relevance of the questions concerning Pettaway. The court stated:

"You certainly could have made an offer of proof to me as to what you wanted to do. I told

^{*} Niang offers no excuse.

you at any time there was anything that went on here where I made rulings that at the next recess bring it to my attention and we would correct it. If you had made an offer of proof with respect to that I would have certainly permitted whatever you wanted to do with it." (Tr. 538).

Thereafter, the court permitted Duke to reopen his case to call a fourth, cumulative alibi witness. Neither Niang nor Williams sought to call Agent Taylor, who as the case agent was seated at the Government table (Tr. 2), to pursue the line of questioning about Pettaway's availability which the court had, in effect, just stated it would permit. Their failure to do so precludes them from asserting error in this Court. See *United States v. Nathan*, 536 F.2d 988, 991-92 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976).

More importantly, however, the District Court's rulings had neither the practical nor legal effects now claimed by Niang and Williams. First, nothing in the court's ruling precluded defense counsel from establishing that Pettaway was unavailable to them. The issue of Pettaway's availability was a legal issue for the court to resolve. Evidence bearing on his availability—both to the Government and defense—could, and should, have been presented to the court. See, *United States v. Arnone*, 363 F.2d 385, 404-05 (2d Cir. 1966).^{*} Yet, other than a single assertion by Williams' counsel that he and his client had attempted to subpoena Pettaway (Tr. 241-42), no proof was offered to the court by Niang or Williams with respect to their efforts, if any, to locate

^{*} The Government's consistent position in the District Court, and one which we reiterate here, was that Pettaway, as an indicted defendant with a pending case and Fifth Amendment privilege, was not "available" to the Government. (Tr. 241-42, 539).

Pettaway.* Nor did the defendants request a charge that Pettaway was unavailable to them. (Tr. 435). The court's ruling simply did not preclude the defense from offering to the court the predicate proof for requesting that charge.

Nor did the court's ruling preclude Niang and Williams from establishing that Pettaway had fled and had, therefore, exhibited consciousness of guilt. (Williams Br. 16-17). First, assuming Taylor testified he did not know where Pettaway was, it would not have established Pettaway had fled. Taylor's knowledge was, on this issue, irrelevant. Second, Niang and Williams could have called witnesses of their own to establish Pettaway's "flight."

In the final analysis, perhaps the only practical result of the court's ruling was that Niang and Williams were not allowed to establish Pettaway's "availability" to the Government through Taylor's cross-examination.** That practical effect was, however, of no legal significance. Proof that Pettaway was available to the Government would not, in the absence of proof that Pettaway was unavailable to them, have entitled Niang and Williams to an instruction that the jury could draw an inference against the Government from its failure to call Pettaway. See, e.g. *Graves v. United States*, 150 U.S. 118 (1893); *United States v. Erb*, 543 F.2d 438 (2d Cir.), cert. denied, 429 U.S. 981 (1976); *United States v. Brown*, 511 F.2d 920 (2d Cir. 1975); *United States v. Crisona*, 416 F.2d 107 (2d Cir. 1969), cert. denied, 397 U.S. 961

* During his summation, counsel for Williams argued to the jury for the first time that defense efforts to subpoena Pettaway had proven unsuccessful. No proof to that effect was in the record and the court, quite properly, sustained the Government's objection.

** Of course, defendants could have called Taylor as their own witness.

(1970); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946). The total failure of defendants to offer any proof of that fact—either to the court or to the jury during their own cases—renders any initial error in the court's ruling, which we do not concede, harmless.*

POINT IV

The District Court Did Not Abuse Its Discretion in Permitting the Government to Offer Evidence of Duke's Prior Conviction as a Similar Act.

Duke contends that the District Court erred in permitting the Government to offer evidence of Duke's prior conviction as a similar act. He claims both that the court's failure to exclude the proof was an abuse of discretion, particularly in view of his offer to stipulate to certain facts, and that the prior judgment of conviction constituted inadmissible hearsay. Neither contention has any merit.

It is clear both by evidentiary rule and case law in this Circuit that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character or disposition. Rule 404(b), Fed. R. Evid.; *United States v. Grady*, 544 F.2d 598, 604-05 (2d Cir. 1976); *United States v. Chestnut*, 533 F.2d 40, 49-50 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Viruet*, 529 F.2d 295 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975), *cert. denied*, 425 U.S. 950

* In perhaps an unprecedented ruling about which Niang and Williams can hardly complain, the court allowed counsel to comment in summation on the Government's objections to the questions put to Taylor concerning Pettaway's whereabouts. (Tr. 539). Both counsel for Niang and counsel for Williams took advantage of that ruling. (Tr. 589, 598).

(1976); *United States v. Gerry*, 515 F.2d 130, 140-41 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1970); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967). Prior and subsequent similar acts are admissible to prove knowledge, intent, identity, and plan or design. *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States v. Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States v. Johnson*, *supra*. Those categories, however, do not limit the circumstances in which the Government is entitled to prove other crimes. *See United States v. Papadakis*, *supra*.

In the trial below, proof offered by the Government clearly showed that on June 16, 1976, Duke was in possession of the stolen Potomac Electric Power Company stock. The Government, however, had the additional burden of proving that Duke's possession of the securities was with knowledge that the securities were stolen, and that when Duke gave the stock certificates to John Hauss, who was, after all, posing as a banker, it was with unlawful intent.

In this regard, evidence that Duke knowingly had stolen securities in his possession during the year prior to his meeting with John Hauss was overwhelmingly probative of the fact that his possession of the securities in this case could not have been, and was not, innocent, but rather was with knowledge of their stolen character and intent to deal with them. Indeed, even Duke's counsel conceded that the prior conviction was admissible for that purpose once the Government established Duke's possession of the stock. In objecting to the Government's proposed offer of the conviction, he stated:

"[U]nless [the prosecutor] has passed the threshold of possession he should not be permitted to introduce items which show guilty knowledge, because there is no way of separating the two. *Once he has proved conclusively possession of these securities, then I say he could put in the conviction.* But he is not past the threshold of possession (Tr. 432) (emphasis added).

Counsel's concession reflected prior decisions of this Court which have specifically approved the introduction of proof of a similar act, in the Government's direct case, as evidence demonstrating that possession of stolen goods was with knowledge of the goods' stolen character. See *United States v. Baum*, 482 F.2d 1325, 1330-31 (2d Cir. 1973); *United States v. Schaffer*, 266 F.2d 435, 442 (2d Cir. 1959), *aff'd*, 362 U.S. 511 (1960); *United States v. Brand*, 79 F.2d 605, 606 (2d Cir.), *cert. denied*, 296 U.S. 655 (1935).

Duke claims that his offer to stipulate that he had knowledge of securities and had worked in a securities firm obviated the necessity of the Government's proffered proof. That claim is patently absurd. As stated above, the Government's burden was to prove that Duke had knowledge of the stolen character of the securities given to him by Hauss and the intent to deal in stolen securities. The facts to which counsel offered to stipulate had no bearing on that issue.

Moreover, contrary to Duke's claim on appeal (Br. 37), it is clear that similar act evidence is admissible to help the Government sustain its burden of proof in its direct case, and the Government need not wait until the defendant affirmatively puts factual questions such as intent or knowledge in issue. *United States v. Freedman*, *supra*, 445 F.2d at 1224 (intent or knowledge may be placed in issue "by the nature of the facts sought to be

proved"); *United States v. DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970); *United States v. Johnson*, *supra*; *United States v. Byrd*, 352 F.2d 570 (2d Cir. 1965).

Duke contends that even if evidence of the conviction was *prima facie* admissible, the District Court erred in failing to exercise the discretion granted it by Rule 403 of the Federal Rules of Evidence to exclude the proof. However, as this Court has recognized, such discretionary rulings should not be disturbed absent arbitrary or irrational action by the District Court. *See, e.g., United States v. Robinson*, Dkt. No. 76-1153, slip op. 5021 (2d Cir. July 28, 1977) (*en banc*); *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

That the court carefully considered this issue and did not abuse its discretion is evident from the record. The question was first raised at a pre-trial conference on November 29, 1976.* At that time, the court deferred ruling on the admissibility of the similar act. (Transcript of pre-trial conference, November 29, 1976, pp. 8-11). The court's final ruling was not made until all of the Government's other evidence was before the jury, thus giving the court full opportunity to assess the conviction's probative value. *See, e.g., United States v. Robinson*, *supra*, slip op. 5021 at 5036; *United States v. Ortiz*, *supra*, 553 F.2d at 784.

Moreover, while a prior conviction undoubtedly has some prejudicial impact, in view of the conviction's overwhelming probative value and the trial strategy adopted

* November 29, 1976 was scheduled to be the first day of trial. However, the defendant Williams failed to appear that morning and a bench warrant was issued. Trial commenced on December 2, 1976, after Williams had been brought back to New York.

by Duke, the balance struck by the court in favor of admissibility was proper. Thus, Duke's defense was one of alibi, coupled with the assertion that the FBI sought to solve its case by "framing" Duke, because he was a Muslim with a prior record. Thus, from the opening statement of his counsel through the conclusion of the Government's case, even prior to the introduction of the similar act, Duke was portrayed by his counsel as a man with a "blemish on his record." (*e.g.* Tr. 21, 23, 186, 375-76, 389, 400, 407). In view of that defense tactic, any prejudicial effect of the Government offering the prior conviction was greatly minimized.*

Duke's final contention in this regard is that the judgment of conviction offered into evidence by the Government was hearsay because it only proved Duke's intent in the prior case and, therefore, did not fall within the rubric of Rule 803(22) of the Federal Rules of Evidence. While not conclusive proof of Duke's intent in the instant case, the prior judgment was certainly probative of that issue and, as such, was admissible for that purpose. See, *United States v. Vario*, 484 F.2d 1052 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *United States v. Rosenwasser*, 550 F.2d 806, 811-12 (2d Cir. 1977) (Gurfein, J., dissenting).

* Duke, citing *United States v. Dwyer*, 539 F.2d 924 (2d Cir. 1976), claims that the District Court's failure to make a record of the mental balancing process that led to its ruling is evidence of the court's failure to conduct that balancing process and requires reversal. In the context of this case, that claim is nonsense. As detailed above, the court made every effort to have all the facts before it before making its decision. Moreover, unlike *Dwyer*, the prejudicial effect, if any, of the proffered evidence was evident and was often enunciated by counsel. The court's failure to repeat counsel's description of that effect is not proof that the effect was not considered by the court in making its determination.

POINT V

There was Adequate Independent Proof of Duke's Participation in the Conspiracy to Allow the Admission against Him of Statements Made by His Co-conspirators.

Duke contends that the independent, non-hearsay proof of his participation in the conspiracy charged was insufficient to justify the admission against him of statements made by Niang and Williams. Duke is only able to make this claim by compartmentalizing some proof and disregarding other proof.

The law in this Circuit is clear, and Duke does not dispute the standard governing the admissibility of the statements made by Niang and Williams. As enunciated in *United States v. Geaney*, 417 F.2d 1116, 1117-18 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970), statements made by persons alleged to be co-conspirators of the defendant may be considered by the jury as evidence against the defendant if the District Court is satisfied by a "fair preponderance of the evidence independent of the hearsay utterances" that the defendant was, in fact, a member of the conspiracy charged. As recently stated by this Court:

"The threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between the defendant and the declarant . . ."

United States v. Glazer, 532 F.2d 224, 228 (2d Cir. 1976), quoting from *United States v. Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

In determining whether the Government has satisfied its burden of showing a "likelihood of an illicit association" by a "fair preponderance of the evidence," the District

Court, of course, is governed by the fact that once a conspiracy has been proved, a single act is sufficient to establish a defendant's participation, provided the act is one from which an intent to join a conspiracy may be reasonably inferred or the Government introduces independent evidence of the defendant's knowledge of the conspiracy and intent to join. See, e.g., *United States v. Head*, 546 F.2d 6, 9-10 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3634 (March 22, 1977); *United States v. Sperling*, 506 F.2d 1323, 1342 (2d Cir.), *cert. denied*, 420 U.S. 962 (1975); *United States v. Rizzo*, 491 F.2d 215, 218 (2d Cir. 1974); *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); *United States v. Ramirez*, 482 F.2d 807, 816 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973); *United States v. Bentvena*, 319 F.2d 916, 927-28 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).^{*} This is particularly true where, as here, the scope of the conspiracy is relatively small. *United States v. Torres*, 503 F.2d 1120 (2d Cir. 1974).

Judged by these standards, the independent non-hearsay evidence of Duke's participation in the conspiracy was clearly sufficient to warrant the admission of Niang's and Williams' statements against him. Thus, the independent proof established that after Pruitt Williams arrived in New York on or about May 19, 1976, Barbine gave the stolen Potomac Electric Power Company stock to Niang who, in turn, gave the stock to Williams to dispose of it. (Tr. 175-77). In the ensuing weeks, Niang and Williams met frequently with Duke, with Barbine sometimes standing only a foot or two away. (Tr. 177-78, 200-

^{*} Such a "single act" is sufficient to warrant submitting the question of a defendant's participation in a conspiracy to the jury. See, e.g., *United States v. Marrapese*, *supra*. A fortiori, a single act may satisfy the "preponderance" test of *Geaney*.

01). Some time after these meetings, Duke gave the very same stolen Potomac Electric Power Company stock to Agent Hauss. (Tr. 395-97).

That chain of circumstantial evidence alone was sufficient to satisfy the *Geaney* standard.* From Duke's possession of the stock after the meetings with Niang and Williams, the court could infer that he had received the stock from them and had associated himself with their illicit venture. Moreover, the court could infer from Barbine's close proximity to Duke, Niang and Williams at their meetings that Duke was aware of Barbine's role, even if not aware of his identity.

Duke's claim that the Government's proof of these meetings merely established an association between Duke and Niang and Williams (Duke Br. 22-24) completely ignores the justifiable inferences that could be drawn from Duke's possession of the stock shortly after these meetings and this Court's admonition in *United States v. Geaney*, *supra*, 417 F.2d at 1121 that "pieces of evidence must be viewed not in isolation but in conjunction."

While we submit that the circumstantial evidence detailed above satisfied the *Geaney* standard, the District Court also had before it direct evidence of Duke's participation in the conspiracy. First, Agent Hauss testified that on June 3, 1976, during the period Duke was meeting with Niang and Williams, Duke told him he could provide him with "freshly taken" common stock. (Tr. 393).

Second, on June 15, 1976, Duke told Hauss he had people flying in from out of town delivering securities. (Tr. 394). Duke now argues that in view of the fact

* Of course, the non-hearsay evidence required to satisfy *Geaney* may be wholly circumstantial. *United States v. Manfredi*, 488 F.2d 588, 596-97 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), *United States v. Ragland*, *supra*, 375 F.2d at 477.

that all of the stock stolen from the Toledo Trust Company was already in New York, the reference to people flying in from out of town was either untrue or a reference to other stocks. (Duke Br. 18). While those were permissible inferences, they were not the only permissible inferences the court was entitled to draw. Thus, the court could infer with equal justification that Duke, in attempting to convince Agent Hauss to continue dealing with him, was describing the scope of his operation and the types of activities it encompassed.*

Third, on June 16, 1976, Duke told Agent Hauss that the Potomac stock would "remain cold" for approximately two weeks. (Tr. 395). That "fact" clearly was not evident from the face of the stock. Crosby, however, had told Barbine back in Toledo some six weeks prior to Duke's meeting with Hauss that it would be six to eight weeks before the stock would be reported missing. (Tr. 208). The court could reasonably infer that Duke had obtained his knowledge from Barbine via Niang and Williams.

Finally, a few days after the delivery of the stock to Hauss, Duke met Hauss again and told him he had a person who could provide Treasury bonds. (Tr. 397-98). Barbine had testified that he held out ten million dollars in treasury and municipal bonds to Niang and Williams as an incentive to accelerate the sale of the stolen stock, see

* There is no requirement that the inferences relied upon by the Government be compelled by the evidence or that the evidence foreclose all inferences supporting innocence. *Holland v. United States*, 348 U.S. 121, 139-140 (1954); *United States v. Bohle*, 475 F.2d 872, 875 (2d Cir. 1973); *United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972); *United States v. Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970). See also *United States v. Pfingst*, 477 F.2d 177, 197 (2d Cir.), cert. denied, 412 U.S. 941 (1973). As this Court recently reaffirmed, "The prosecution . . . is under no duty to negate all possible innocent inferences from a set of circumstantial facts. . . ." *United States v. Singleton*, 532 F.2d 199, 203 (2d Cir. 1976).

n. p. 12, *supra*. The court could reasonably infer that the treasury bonds mentioned by Duke were the same ones Barbine had mentioned to Niang and Williams and that Duke's possession of that information, like his possession of the stock, was further evidence that Duke had joined Niang, Williams and the others in the conspiracy charged.

In sum, the independent non-hearsay evidence overwhelmingly established Duke's participation in the conspiracy charged * and the statements of Niang and Williams, were, therefore, admissible against him.**

One final claim made by Duke in this regard deserves brief comment. Duke asserts that the District Court failed to make the determination required by *Geaney*. (Duke Br. 21). Throughout the trial, the court admitted

* This case is, therefore, unlike *United States v. Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) upon which Duke relies. In that case, the Government totally failed to establish that the defendant associated himself with the narcotics conspiracy charged.

** While Duke's participation in the conspiracy was overwhelmingly established without any reference to the statements of Niang and Williams, we note that, contrary to Duke's assertion (Br. 16-17), not all of those statements were hearsay. Thus, even without reference to the co-conspirator exception, Rule 801(d)(2)(E), Fed. R. Evid., the statements of Niang and Williams that they were going to meet with Duke to see what was happening to the stock, made before their meetings with Duke, were admissible both as statements of their present intent, Rule 803(3), Fed. R. Evid., and as verbal acts, admissible to give context and meaning to the subsequent meetings. See, e.g. *United States v. Ortiz*, *supra*, 553 F.2d at 784; *United States v. Head*, *supra*, 546 F.2d at 9; *United States v. Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States v. Manfredi*, *supra*, 488 F.2d at 596; *United States v. Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). Evidently, as this Court noted in *United States v. Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974), "the notion that any reference to a conversation constitutes hearsay, inadmissible unless within an exception, dies exceedingly hard."

the "co-conspirator hearsay" statements "subject to connection." At the conclusion of the case, the court denied the defendants' motions for judgments of acquittal, specifically stating that Duke's membership in the conspiracy was a question of fact for the jury. (Tr. 524). Where, as here, out of court statements by alleged co-conspirators are testified to during the trial and the District Court defers a *Geaney* ruling until all the evidence is in, a decision to allow the jury to consider the hearsay is treated by this Court as the equivalent of a decision by the District Court that *Geaney* was satisfied. In those circumstances, the sole determination for this Court to make is whether that decision was a reasonable one. *United States v. Green, supra*, 523 at 233 n. We submit the District Court's decision in this case was.

POINT VI

The Proof Established a Single Conspiracy and There Was No Prejudicial Variance Between the Indictment and the Proof.

Duke now claims for the first time that there was a prejudicial variance in that the indictment alleged one conspiracy while the proof established more than one. In the District Court, Duke made no severance motion on that ground. Nor did he request a charge on multiple conspiracies or except to the District Court's charge on the law of conspiracy. As such, he "comes ill-equipped to this Court asserting error." *United States v. Hess, supra*, 546 F.2d at 7-8, citing *United States v. Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1963). We show below that Duke's claims of error, in addition to being untimely, are unfounded.

A. The proof established a single conspiracy

The indictment in this case charged a single conspiracy with three objectives: (1) the theft and embezzlement of securities from the Toledo Trust Company; (2) the transportation of those securities from Toledo to New York and (3) the receipt and disposition of those securities. That Duke joined Niang and Williams in this conspiracy with knowledge of at least its second and third goals was certainly an inference the jury was entitled to draw from the evidence set forth in the Statement of Facts and Point V, *supra*. That Duke may have joined the conspiracy after its formation, known of only some of its goals and known only some of the co-conspirators * is, of course, irrelevant. See, e.g., *United States v. Kahaner*, 317 F.2d 459, 468 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); *United States v. Ageuci*, *supra*, 310 F.2d at 827.

Duke characterizes his position in this conspiracy as that of a person at the "end" of a chain conspiracy (Duke Br. 25-26). Then, citing a series of decisions by this Court involving large, continuing, illegal narcotics businesses, Duke argues that persons on "either end" of such a conspiracy have no "reason to know" of the involvement of others in the conspiracy and, therefore, cannot be found to be part of a single conspiracy absent proof that the organization was conducting its business on both a large scale and regular basis. (Duke Br. 25-27). That analysis ignores both the fundamental distinction between this case and the large, multi-defendant narcotics cases on which Duke relies, and the fact that the evidence in this case demonstrated that whatever his "reason to

* It could be reasonably inferred that Duke knew of Barbine's participation in the conspiracy in addition to that of Niang and Williams. See p. 36, *supra*.

know," Duke had actual knowledge of the scope of the conspiracy and the participation of at least two of his co-conspirators.

In the cases cited by Duke, this Court has been confronted with the problem of determining whether multiple narcotics importation and distribution chains, linked together in some but not all respects, constituted single or multiple conspiracies. In that context, the Court has, quite properly, looked, among other factors, to the size and continuity of the business, the mutual interdependence of the defendants and the quantity of contraband involved in the daily operation of the business. See, e.g., *United States v. Moten*, Dkt. No. 77-1085, slip op. 5769 (2d Cir. September 6, 1977).

The instant case, however, involved not a large, ongoing illegal business with multiple distribution chains, but a single distribution chain. In such instances, to hold that the Government is required to meet the criteria set forth in cases such as *United States v. Moten*, *supra*, to establish a single conspiracy would be, in effect, to hold the conspiracy laws inapplicable to single transactions, a result clearly not intended by this Court's prior decisions. See e.g., *United States v. Borelli*, 336 F.2d 376, 382-84 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

Moreover, the facts in this case refute Duke's assertion that he had no knowledge of the broader conspiracy. To briefly reiterate: B bine was present when Duke met with Niang and Williams; the jury could infer that Duke obtained the stock from Niang and Williams; and Duke stated he had people delivering stock from out of town and that he could obtain treasury bonds for Agent Hauss. Whatever Duke's theoretical lack of "reason to know" and lack of reason to have interest in how the stock was acquired (Duke Br. 25, 27), the evidence established that he actually *had* knowledge of those facts and knowingly

joined the conspiracy charged with the purpose of furthering its ultimate goal—the sale of the stolen stock.*

B. Assuming *arguendo* a variance between the indictment and proof at trial, Duke was not prejudiced

Assuming *arguendo* that there was a variance between the indictment and the proof at trial, Duke is entitled to relief only if that variance affected his “substantial rights.” *Berger v. United States*, 295 U.S. 78 (1935). The record in this case clearly demonstrates, however, that the variance, if any, did not prejudice Duke. As shown above, the proof against Duke was compelling. Even if there were a variance, the proof at most showed three conspiracies and the trial involved the presentation of simple proof involving only three defendants. The trial lasted only five days, from jury selection to verdict. Moreover, even if Duke entered into a separate conspiracy with Niang and Williams to receive and dispose of stolen securities which were moving in and constituted interstate commerce, their statements would have been admissible against him. Finally, at any such trial, the Government would have been required to prove the theft and interstate transportation of the securities. As such, all of the proof adduced at the trial below would have been admissible against Duke in any separate trial. Under those circumstances, the variance, if any, was not prejudicial. See e.g., *United States v. Lam Lek Chong*, 544 F.2d 58 (2d Cir. 1976); *United States v.*

* This case is, therefore, unlike *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), relied upon by Duke, in which the Government did not produce evidence of the defendant's knowledge that others were involved in the crime. Of course, in *United States v. LaVecchia*, 513 F.2d 1210 (2d Cir. 1975), also cited by Duke, the majority held that the evidence established a single conspiracy.

Miley, 513 F.2d 1191 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States v. Cirillo*, 499 F.2d 872 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States v. Calabro*, 467 F.2d 973 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

Finally, with undue optimism, Duke argues that reversal of his conviction on the conspiracy count will require reversal of his conviction on the substantive count as well. Assuming *arguendo* that this Court were to reverse Duke's conviction on the conspiracy count, Duke has failed to make a showing sufficient to warrant reversal of his conviction on the substantive count.

As Duke recognizes (Duke Br. 39), "the law on this point in this Circuit is clear." Duke is only entitled to the relief he seeks if he demonstrates bad faith on the part of the Government in bringing the conspiracy charge or prejudice, *United States v. Variano*, 550 F.2d 1330 (2d Cir. 1977); *United States v. Branker*, 395 F.2d 881 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969). Duke does not challenge the Government's good faith. Nor can he show prejudice.

The Government produced clear and convincing proof of Duke's guilt on the substantive count. An undercover agent of the FBI testified that Duke gave him the stolen Potomac Electric Power Company stock, told him the stock was stolen and, in effect, told him it had been brought from out of New York State. Two surveillance agents corroborated the fact of the meetings between Duke and the undercover agent.*

* The surveillance photographs (GX 18, 19, 20, 21), while "slightly fuzzy" (Tr. 380), were clear enough to be admitted in evidence for the jury to evaluate in determining whether Duke was the person with whom Hauss met.

On the other hand, Duke's alibi witnesses were substantially impeached. The first witness, after denying any relation to Duke conceded that his son and Duke were brothers. The second witness, Duke's brother, denied being a Muslim only to have the third witness refer to him by his Muslim name during that witness' direct testimony. The third witness conceded that he and his religious brothers grouped together and helped each other out in times of trouble. The fourth witness did not know Duke's whereabouts during the critical time period on June 16, 1976. Duke's alibi defense, while simple, was far from strong. (See Duke Br. 38).

Finally, the lack of prejudice to Duke from the inclusion of the conspiracy count is evident from the jury's verdict. Of the four counts with which he was charged, Duke was convicted only of the conspiracy count and the count on which the Government produced direct proof that he had possession of the stolen stock. Duke was acquitted on the substantive counts relating to stock the Government could not put in his hands. Clearly, the jury's verdict does not reflect that Duke was "unfairly ensnared" (Duke Br. 40) by the declarations of his co-conspirators, which described him as the person to whom *all* the stolen stock would be delivered.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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HOWARD W. GOLDSTEIN,
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 Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Howard W. Goldstein being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *3rd* day of *November*, 1977,
he served ~~two~~ ^{two} copies of the within brief by placing the same
in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Howard W. Goldstein

Sworn to before me this

3rd day of November, 1977

Mary L. Avent
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No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1978

